NO. 84-96

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

INLAND MARINE INDUSTRIES, RUDY SUTTON, DOUGLAS SUTTON, STANLEY SUTTON,

PETITIONERS,

v.

FLETCHER L. HOUSTON,

RESPONDENT.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OFFICIAL AND UNOFFICIAL REPORTS

This case is reported as Houston v. Inland Marine Industries, 29 F.E.P. Cases 557 (N.D. Ca. 1982), aff'd. sub nom, E.E.O.C. v. Inland Marine Industries, 729 F.2d 1229, 34 F.E.P. Cases 881 (9th Cir. 1984).

STATEMENT OF THE CASE

Respondent Fletcher Houston filed a charge of racial discrimination in compensation against petitioners on August 5, 1980. On May 19, 1981, the Equal Employment Opportunity Commission ("E.E.O.C.") found cause to believe that petitioners did discriminate against Houston and other blacks, and subsequently filed suit in federal court. Houston filed his individual discrimination and tort action in the Municipal Court of the State of California. That suit was removed to federal court and consolidated with the E.E.O.C. case.

The decisions of the lower courts contain a complete discussion of the facts of the case. What follows is a summary.

Petitioners paid Houston and all other blacks $.25 to $.50 an hour less than whites for assembling ship berths at their Alameda,

California facility. They hired Houston on April 24, 1980, and paid him $4.50 an hour. Petitioners hired six additional blacks for the same work and started them at $4.50 an hour.

During the same period, petitioners hired four whites to assemble ship berths for $5.00 an hour. Petitioners fired one of these white workers for incompetence. Petitioners did not fire a single black worker and conceded that their job performance was entirely satisfactory.

In addition to the stark wage disparity, blacks were not extended the same privileges in the wage-setting process as were whites. Petitioners allowed at least two whites to negotiate a $.50 an hour increase from $4.50 an hour to $5.00 an hour prior to their hire. Petitioners denied higher starting pay to those blacks who attempted to negotiate their wages.

Petitioners assessed the intelligence of white employees during the initial interviews. They did no such evaluation of blacks.

Petitioners allowed a white to demonstrate his job skills by working a day prior to wage setting. Blacks were not allowed to do so.

Petitioners gave a raise to a white employee for bringing his own tools to work. They never informed blacks that such action might lead to a raise.

Upon learning of the wage disparity, Fletcher Houston and another black, Thomas Dunn, requested raises to $5.00 per hour. The basis for their demand was the pattern of unequal pay between blacks and whites at Inland Marine. Petitioners denied their request twice, but did give Houston and Dunn a raise to $4.75 an hour. At the same time these two blacks received a $.25

an hour raise, a white employee was raised from $5.00 to $5.50 an hour. Petitioners did not grant raises of any kind to other black employees.

In addition, petitioner Douglas Sutton paid Houston and Dunn out of his personal funds in an effort to quiet their protests.

After four days of trial, petitioners were found guilty of intentional racial discrimination. The court awarded Houston back pay of $268.85, compensatory damages of $500.00, attorneys fees of $7,500.00 and $702.17 in costs.

On April 5, 1984, the Ninth Circuit Court of Appeals affirmed the judgment of the trial court in all respects. E.E.O.C. v. Inland Marine Industries, 729 F.2d 1229 (9th Cir. 1984). This petition followed.

ARGUMENT

I. THIS PETITION RAISES NO NEW ISSUES MERITING THE ATTENTION OF THE COURT.

This case raises no substantial legal or factual issue requiring the attention of the Court. Its only unique aspect is the extent to which petitioners have resisted payment of a rightful claim for little more than $250.00 in wages. Apparently, petitioners feel their "integrity has been impugned." Petition at 11. Integrity has never been the issue here; discrimination is.

Rule 17 of the Rules of the Supreme Court outlines the "special and important reasons" required for the grant of a petition for writ of certiorari. Petitioners have failed to raise any issues of sufficient import to justify a grant of their petition. They have attempted to conjure up a conflict between the lower

court opinions and an opinion of this Court, but as is fully explained below, no such conflict exists.

The legal issue concerning burdens of proof and ultimate findings in employment discrimination cases raised by petitioners has already been the subject of considerable attention from this Court. Petitioners have made absolutely no showing that these issues need further review in this case.

While is is clear that petitioners would like yet another review of the factual determinations made and affirmed by two lower courts, they have failed to show, or even to argue, that the issues they raise have any "importance to the public as distinguished from that of the parties." Layne & Bowler Corp. v. Western Well Works, 261 U.S. 385 (1923). See also Rice v. Sioux City Cemetery, 349 U.S. 70,

79 n.2 (1955) (". . . the question was of importance merely to the litgants and did not present an issue of immediate public significance.").

No error was committed by the courts that have already reviewed this case. Indeed, even if there were error, no issues of sufficient public importance are raised by the petition to justify a review here. For this reason alone, respondent requests that the petition be denied.

II. THE LOWER COURT DECISIONS IN THIS CASE STRICTLY FOLLOW THE LAW OF EMPLOYMENT DISCRIMINATION AS LAID DOWN BY THIS COURT.

A. What the Law Requires.

In the 20 years since the passage of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., this Court has developed a full body of case law for the guidance of the lower federal courts in applying the broad anti-discrimination provisions of the

Act. Both the trial and appellate courts carefully and explicitly followed this body of law in reaching the ultimate determination that defendant-petitioner Inland Marine Industries discriminated against plaintiff-respondent Fletcher Houston, a black man.

Much of the law in this area has discussed "the allocation of burdens and order of presentation of proof" in a discrimination action. Texas Department of Community Affairs v. Burdine ("Burdine"), 450 U.S. 248, 252 (1981) as quoted in United States Postal Service Board of Governors v. Aikens ("Aikens"), 460 U.S. ____, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983). As an initial matter, the plaintiff has the burden of proving a prima facie case of discrimination. The seminal case describing and defining a prima facie case in this context is McDonnell Douglas

Corp. v. Green ("McDonnell Douglas"), 411 U.S. 792 (1973). McDonnell Douglas stands for the principle that a plaintiff in a discrimination action must present evidence which, if unexplained, would lead the finder of fact to conclude that discrimination had, indeed, occurred. For example, in a hiring case, the plaintiffs can meet their prima facie burden if they show that they are members of the group victimized by discrimination; applied for a position that was, indeed, open; were not hired; and were qualified for the position. McDonnell Douglas v. Green, 411 U.S., at 802. Since its decision in McDonnell Douglas, this Court has time and again reasserted the vitality of the prima facie case concept in defining plaintiff's initial burden of proof. United States Postal Service Board of Governors v. Aikens, 460 U.S.___, 103

S. Ct. 1478, 75 L.Ed.2d 403 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Company v. Waters, 438 U.S. 567 (1978); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

After plaintiffs have made a prima facie showing, the burden of going forward with evidence shifts to the defendant. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court thoroughly examined the nature of that burden. Under Burdine, the defendant must "articulate some legitimate, nondiscriminatory reason" for its actions. Burdine, 450 U.S. at 253. This "articulation" consists of evidence which "raises a genuine issue of fact as to whether it [defendant] discriminated against the plaintiff. . . . [T]he defendant must clearly set forth, through the introduction

of admissible evidence, the reasons for" its actions. Burdine, 450 U.S. at 254, 255.

In United States Postal Service Board of Governors v. Aikens, 460 U.S. ___, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983), the Court re-emphasizes that which was assumed in McDonnell Douglas and Burdine, but not emphasized due to the focus of those two cases. Aikens points out that the ultimate factual finding of discrimination in a Title VII case cannot be ignored by too great a fascination with the burden and allocation of proof issues discussed in McDonnell Douglas and Burdine, and many other cases. The trial court must focus "directly on the question of discrimination." Aikens, 103 S. Ct. at 148, 75 L.Ed.2d at 411.

This was precisely the error in the lower court opinions in Aikens that the Court referred to when it expressed

"surprise" that the ultimate issue of whether or not discrimination had occurred seemed completely buried. Instead, a reading of the trial and appellate opinions in Aikens shows, as this Court noted, that they contain elaborate and extended discussion of exactly what "qualified" means in the context of a prima facie case and little, if any, mention of the ultimate issue. Aikens v. Bolger, 23 F.E.P. Cases 1138 (D.D.C. 1979), rev'd. 642 F.2d 514 (D.C. Cir. 1980); on remand, 665 F.2d 1057 (D.C. Cir. 1981). The lower courts focused on the prima facie case despite the fact that the entire case had been tried, all evidence presented, and the allocation and burden of proof issues had been subsumed in the larger question of whether or not Title VII had been violated. Aikens, 103 S. Ct. at 1482, 75 L.Ed.2d at 410.

While Aikens does close the circle of analysis begun in McDonnell Douglas and Burdine, it also reaffirms these and a myriad of other cases which explain and describe just what the "allocation and order of presentation of proof" is to be in an employment discrimination action. Indeed, the entire McDonnell Douglas/ Burdine analysis is repeated with approval in Aikens. The earlier cases are also cited with approval. Aikens, 103 S. Ct. at 1481, 75 L.Ed.2d at 409.

With an understanding of these legal developments, the very manner in which petitioners here pose their first question for review[1/] reveals a fundamental

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1/ The question so raised is "Whether, in a Title VII wage discrimination case fully tried on the merits, the Ninth Circuit Court of Appeals erred in affirming the district court's prima facie case and burden-shifting analysis rejected by this Court in United States Postal Service v. Aikens, 460 U.S. ___, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983)." Petition at 1.

misapplication of the law. Aikens cannot, even under the most lax reading of its holding, be interpreted as a "rejection" of McDonnell Douglas, Burdine, Teamsters, Furnco, and numerous other decisions. What Aikens requires is a firm eye on the inquiry into the issue of discrimination. It clearly does not require that the law on burden of proof that has been carefully developed by this Court and elaborated in hundreds of trial and appellate court opinions be ignored. Indeed, as Aikens itself recognizes, the law of proof under Title VII is part and parcel of an entire body of law, none of which can become so exclusive a focus of decision-making that other important legal issues are forgotten.

Petitioners' approach is as logically and legally absurd as was that of the lower courts in Aikens. Just as no civil suit should proceed to judgment without a

full discussion of the ultimate issue, no civil suit can proceed properly unless the burdens of proof are correctly ordered and allocated. Aikens, 103 S. Ct. at 1482, 75 L.Ed.2d at 410. In order to insure that the law of proof in an employment discrimination action is followed, the Ninth Circuit Court of Appeals requires trial courts to describe the process by which "the factual inquiry proceeds to a new level of specificity." Burdine, 450 U.S. at 255, as cited in Aikens, 103 S. Ct. at 1482, 75 L.Ed.2d. at 410. See Peters v. Lieuallen, 693 F.2d 966, 969 (9th Cir. 1982); E.E.O.C. v. Inland Marine, 729 F.2d 1229, 1235 (1984). There is absolutely nothing in Aikens which rejects such an approach.

B. The Trial Court Followed Supreme Court Precedent.

In its short written decision in this case, the trial court strictly followed

the allocation of burdens and order of presentation of proof required by McDonnell Douglas and Burdine. It also made a finding of intentional discrimination -- the ultimate question before it -- as required by Aikens. Houston v. Inland Marine, 29 F.E.P. Cases 557 (N.D. Ca. 1982), reproduced in the Petition herein at Appendix C.

First, the court found that plaintiff had made a prima facie case of intentional discrimination by proving the two-tier, racially biased wage system and the wholly subjective wage setting practices of the defendants. 29 F.E.P. Cases at 558; Petition at 23-C. The trial court then proceeded to the next level of analysis and determined that the defendants had failed to rebut the inference of discrimination because they did not adduce

sufficient evidence of nondiscriminatory reasons for the wage disparities. 29 F.E.P. Cases at 558; Petition at 23-C. The trial court, as fact finder, concluded that the defendants' evidence did not lead to the rational conclusion that they had not been motivated by illegal discriminatory animus. Burdine, 450 U.S. at 257.

Finally, as required by this Court in Aikens, the trial court proceeded to the ultimate question of discrimination and decided that it believed the evidence presented by Houston over any countervailing evidence presented by defendants. It did so on at least four occasions, orally and in its written opinion, when it found that defendants had intentionally discriminated against Houston on the basis of race by paying him less than white employees:

1. "The Court finds that the informal system which was used at Inland Marine . . . clearly did constitute racial discrimination." Petition at 10-B.

2. "The Court found that defendant Inland Marine paid black employees less, in hiring and promotion, than defendant paid other employees for the same work and that such acts were intentional." 29 F.E.P. Cases at 557; Petition at 19-C, 20-C.

3. ". . . the company intended to discriminate against its black employees within the meaning of Lynn." 29 F.E.P. Cases at 558; Petition at 24-C.

4. "It is the opinion of this Court that defendant was primarily motivated by subtle, but nevertheless discriminatory attitudes, and thus is liable to plaintiff under Title VII and section 1981." 29 F.E.P. Cases at 558; Petition at 24-C, 25-C.

That the trial court went beyond the prima facie case is clearly demonstrated by its discussion of defendants' failure to correct the disparity once respondent called attention to it. Such failure to correct is not related to any part of the prima facie case elements. It is only related to the ultimate question of whether defendants intentionally

discriminated. The trial courts' discussion of the failure to correct the disparity therefore shows that it followed Aikens and, going beyond the prima facie case, discussed the ultimate questions.

The decisions of the trial and appellate courts in Aikens focus on how the qualification element of the McDonnell Douglas prima facie is to be construed. By direct contrast, the trial court here made numerous findings on the ultimate issue of discrimination as required by Aikens.

C. The Ninth Circuit Properly Affirmed the Trial Court's Decision.

The Ninth Circuit Court of Appeal affirmed in all respects the trial court decision in this case over the same objection raised by petitioners here. The Court approved the trial court's prima facie and rebuttal analysis. E.E.O.C. v. Inland Marine Industries, 729 F.2d. 1229 (1984).

In a detailed discussion of the lower court's finding of intentional discrimination, the Ninth Circuit pointed out that, unlike the Aikens trial court, Judge Aguilar made numerous findings on the ultimate issue of discrimination. This finding was amply supported by the unbroken, two-tier wage structure which invariably doomed blacks to a lower pay rate than whites. In addition, the Ninth Circuit noted that the petitioners reinforced the inference of intentional discrimination that could reasonably be drawn from the two-tier system by refusing to change the situation after it was brought forcefully to their attention by respondent Fletcher Houston. Therefore, the appellate court found that the trial court based its finding of intentional discrimination on a reasonable interpretation of the factual record before it.

Finally, the appellate court noted other factual material in the record which suggests a pattern of disparate treatment. For instance, petitioners set wages for a white following a demonstration of ability, while holding blacks to fixed rate of $4.50 per hour regardless of ability. Petitioners allowed a white to earn a raise when he purchased his own tools, but not blacks. Petitioners allowed whites to work long days to prove their worth, but not blacks. E.E.O.C. v. Inland Marine, 729 F.2d at 1231. In addition, the record shows that petitoners reviewed the work of whites for the purpose of giving raises in pay, but did not extend the same consideration to blacks. Petitioners also negotiated higher pay rates with whites who objected to the initial offer, but refused to negotiate with blacks.

Thus, petitioners' various characterizations of the fact finding done by the lower courts are wrong. In their second question for review, petitioners suggest that the courts relied solely on petitioners' ratification of pay disparities to support their findings of intentional discrimination. In their argument (Petition at 28), they assert that the Ninth Circuit relied solely on the wage disparity itself. Neither of these assertions is true. The trial court explicitly relied on the wage disparities and a myriad of subjective practices. The Ninth Circuit also affirmed the findings of the trial court and noted that petitioners' ratification of the two-tier pay system was ample circumstantial evidence of intent.2/

2/ Petitioners misquote the court on this point. The court did not say that the only evidence here was a ratification.

Despite petitioners' assertion to the contrary, this conclusion is entirely consistent with Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979), which held that intent "implies that the decisionmaker . . . reaffirmed a particular course of action . . . 'because of' its adverse effects upon an identifiable group." This statement characterizes perfectly the holding of the Ninth Circuit here.

In their second question presented for review, petitioners also ask this Court to re-analyze the sufficiency of the evidence presented. They are so concerned with the fact finding done below that fully half of their petition is a discussion of the facts of this case.

The issue of whether or not petitioner intentionally discriminated against Fletcher Houston "is a pure question of fact."

Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). This Court does not review the factual findings of two concurring lower courts "in the absence of a very obvious and exceptional show of error." Graver Manufacturing Co. v. Linde Co., 336 U.S. 271, 275 (1949). This rule applies with equal force to findings of discrimination. Rogers v. Lodge, 458 U.S. 613, 623 (1982). The lower courts here had ample evidence upon which to base a finding of discrimination and to affirm such a finding. See Statement of the Case above; and Decision of Court of Appeal, Petition at Appendix D. Respondent Houston urges this Court to avoid yet another evaluation of that factual issue.

III. CONCLUSION

The lower courts in this case have carefully followed Title VII of the Civil Rights Act of 1964 as interpreted by

this Court. There is no conflict between their decisions and any decision of this Court, nor is there any flaw in their fact-finding efforts. Therefore, respondent Fletcher Houston requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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